VIA E-MAIL

March 2, 2000

Mary Bernstein, Director
Office of Drug and Alcohol Policy
and Compliance
United States Department of Transportation
400 7th Street, SW, Room 10403
Washington DC 20590

Re: **Petition for Severance and Expedited Initiation of a Negotiated Rulemaking**

Dear Mrs. Bernstein:

In its pending rulemaking in Docket OST-99-6578, Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 64 Fed. Reg. 69076, DOT is proposing new requirements related to service agents. Among the proposals is the adoption of a new subpart R, the Apublic interest exclusion@ (PIE), which is intended to establish procedures and sanctions for addressing noncompliance with the requirements of Part 40 by service agents. While the Substance Abuse Program Administrators Association (SAPAA) agrees that noncompliance with Part 40 by some service agents has occurred, SAPAA believes that consideration of an appropriate mechanism, let alone just one mechanism, to address service agent noncompliance presents issues far too complicated to be addressed in a traditional non-interactive rulemaking proceeding. Accordingly, SAPAA hereby respectfully requests that the subpart R provisions be severed from the current rulemaking proceeding and that the Office of the Secretary (OST) initiate a new and separate proceeding specifically to address the service agent question, pursuant to and in accordance with the provisions and procedures of the Negotiated Rulemaking Act of 1990 (NRA), 5 U.S.C. ''561 - 570.

There is little, if any, disagreement among the public generally, including most service agents, that a service agent=s noncompliance with Part 40 can have potentially significant and detrimental effects on the affected employer and its employees. However, there is significant disagreement regarding whether PIE is the appropriate solution. Indeed, according to the feedback SAPAA has received from its members, the PIE proposal is by far and away the most controversial of any of the new requirements which OST has proposed and its consequences would be the most significant.

Clearly OST is to be commended for the efforts it has made to construct the PIE and its procedures. However, OST=s conclusion that the PIE is the only viable solution to a problem whose scope and substance the notice of proposed rulemaking (NPRM) does not define, and is therefore yet to be determined, is at best premature. In spite of OST=s best efforts, there are a number of significant procedural and substantive due process questions which the NPRM did not address and must be resolved if the PIE is to be implemented successfully. These include, among other things, the proposed rule=s failure to ensure that service agents will always have a right to confront their accuser (see proposed '40.373, which provides that a service agent will have an opportunity to Aconfront any witnesses the initiating official presents.@) and the lack of any objective criteria to govern the Director=s designation of the length of time a PIE will remain in effect (see proposed '40.383). While OST has publically attempted to downplay the role and the frequency at which the PIE will be used, DOT should not be surprised to hear that, and should certainly understand why, those who are the potential subjects of the PIE and are at risk to its significant consequences cannot afford to take comfort in or rely upon DOT=s informal and non-binding assurances that they will not be unaffected by the PIE. To do so would place services agents in harm=s way if for no other reason than that they could be confronted in the future by an argument from DOT that the right to challenge the PIE had been waived.

It is also important to note that the NPRM is the first time that the fundamental concept of and fundamental need for a PIE proposal was first discussed by OST. Certainly the advanced notice of proposed rulemaking (ANPRM) did not raise the issue of service agents as a topic for discussion or otherwise suggest that the NPRM would seek to impose any specific solutions. To the contrary, the ANPRM stated:

> The Department conceives this ANPRM, then, <u>not as an occasion for suggesting major substantive changes</u> to how we test for drugs and alcohol, but rather as an opportunity to clarify the myriad details of Part 40. We want to make the rule as easy to understand and apply as we can, reduce burdens where feasible, take Alessons learned@ during the several years of operating the program under Part 40 into account, <u>correct problems that have been identified</u>, clarify areas of uncertainty or ambiguity, and incorporate, where appropriate, the Department's interpretations of Part 40 into the regulatory text. We also anticipate reordering provisions of the rule so that the material flows more smoothly and is easier for readers to follow.

61 Fed. Reg. 18713 (1996). (Emphasis supplied).

Moreover, an obvious and more fundamental question exists regarding DOT=s jurisdiction over service agents in general, let alone DOT=s authority to impose the PIE.

Because the PIE will ultimately function as a Ablacklist,@ it is relatively problematic that the adoption of PIE could trigger a legal challenge to be brought by one or more of the affected interest groups identified by OST as falling within the PIE=s scope **C** Acollection site personnel, BATs and STTs, laboratories, MROs, substance abuse professionals, consortia, and third-party administrators,@ 64 Fed. Reg. at 69098. Further, even if such a legal challenge would not result in at least preliminarily enjoining DOT from having the power to enforce the PIE pending the court=s decision, such a lawsuit might nonetheless have a chilling effect on the PIE=s administration during the interim.

It is with these issues in mind that SAPAA believes the resolution of DOT=s underlying concerns regarding service agent compliance with Part 40 can be better and more effectively addressed through a negotiated rulemaking than through the instant proceeding. As the Congressional findings to the NRA point out in relevant part:

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> (2) Agencies currently use rulemaking procedures that may discourage the affected parties from meeting and communicating with each other, and may cause parties with different interests to assume conflicting and antagonistic positions and to engage in expensive and time-consuming litigation over agency rules.
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> (3) Adversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise, and technical abilities possessed by the affected parties.
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> (4) Negotiated rulemaking can increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court. It may also shorten the amount of time needed to issue final rules.

5 U.S.C. '561, note. Congress= insights should well resonate here.

Last Fall representatives of SAPAA approached OST and held a meeting titled "***First SAPAA Invitational Industry Conversation***" to discuss informally the need for "***Standards of Practice as May be Obtained Though Federal, Self - or Non-Regulation***" and toward that goal solicited DOT=s support and assistance. It is in the spirit of those discussions that SAPAA=s instant petition is being filed in order to formalize the process begun last Fall and also facilitate an open and candid discussion of other, less controversial, solutions regarding service agent compliance which can be achieved in a timely way.

In this regard, all or virtually all of the statutory prerequisites for a negotiated

rulemaking, 5 U.S.C. '563, are present: First, there is a need for a rule. Second, there are a limited number of identifiable interests that will be significantly affected by the rule. Third, there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who can adequately represent the identified interests and are willing to negotiate in good faith to reach consensus. Fourth, there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time. Fifth, the negotiated rulemaking procedure will not unreasonably delay notice of proposed rulemaking and the issuance of the final rule, while a legal challenge to the PIE could delay not only its implementation but the implementation of alternative solutions for a potentially significant time. Sixth, SAPAA believes that DOT has adequate resources and should therefore be willing to commit such resources, including technical assistance, to the committee to address this matter in a constructive way.

Importantly, the initiation of a negotiated rulemaking would not prevent DOT from addressing service agent non-compliance problems which may from time-to-time arise. Thus the protections which OST intends to provide employers and employees who are subject to the testing mandates would clearly be available and the potential harm to employers and employees during the interim minimal at best; certainly no greater than they currently are. Indeed, DOT could informally follow the procedures outlined in proposed ''40.367 and 40.369 on a case-by case basis during the pendency of the rulemaking, as it has the currently has the discretion to do. The only that would be affected in the near-term would be DOT=s utilization of the issuance of a APIE@ exclusion as DOT=s administrative sanction.

For the foregoing reasons, therefore, SAPAA respectfully requests OST to sever the subpart R proposal from the current rulemaking and, on an expedited basis, that OST initiate a negotiated rulemaking to address and resolve the issues which concern service agent compliance with Part 40. SAPAA truly believes that by severing subpart R from this rulemaking, OST will not only have a more effective opportunity to address the service agent issues, but will also minimize the likelihood of opposition to the rulemaking overall.

Sincerely,

Robert C. Schoening, C-SAPA
Co-Chair, Governmental and Legislative Affairs
Committee
Substance Abuse Program Administrators Association

cc: Robert Ashby (via e-mail)
Docket Clerk, Docket No. OST-99-6578

Matt Fagnani, C-SAPA, President,
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